STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: November 18, 2022]

JUTONUS, LLC,	:	
Petitioner,	:	
	:	
v.	:	**C.A. No. WM-2022-0091**
	:	
PAUL FIANO; MARY LOU ROSENCRANZ, AND HER UNKNOWN HEIRS; AND PREMIER CAPITAL LLC,	:	
Respondents.	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is Petitioner, Jutonus, LLC's (Jutonus) Petition for foreclosure of redemption in the property located at 22 Breach Drive Westerly, Rhode Island 02891 (Property). Premier Capital LLC, a lienholder, (Premier Capital) objects to the Petition. A hearing was held on October 21, 2022. Jurisdiction is pursuant to G.L. 1956 § 44-9-24.

I

Facts and Travel

The facts giving rise to this action are largely uncontested. Paul Fiano received title to the Property through Warranty Deed recorded on April 12, 2006. (Tax Examiner's Report (Report) 2.) A Writ of Attachment was issued and subsequently recorded on February 17, 2015 in the Westerly Town Clerks Office at Book 2015, Page 1748. *Id*. at 3.

On September 29, 2016, Paul Fiano filed for Chapter 13 Bankruptcy in the United States Bankruptcy Court for the District of Connecticut, Case No. 16-21558. (Pet'r's Ex. B.) An automatic stay was issued pursuant to 11 U.S.C. § 362(a).

Due to the nonpayment of real estate taxes, a tax sale occurred on June 27, 2017.[1] (Pet'r's Ex. A.) As the highest bidder, Jutonus purchased the Property. *Id*. Jutonus later received title through Collector's Deed dated July 6, 2017. (Pet'r's Ex. A.) Jutonus duly recorded the deed in the Record of Deed's Office of the Town of Westerly in Deed Book 2017 at 12171. *Id*.

On March 10, 2022, Jutonus petitioned this Court to foreclose all rights of redemption. (Petition to Foreclose (Petition).) In accordance with § 44-9-24, Raymond J. Tomasso, Esq. was appointed to serve as Title Examiner. (Report.) Attorney Tomasso submitted his findings on March 16, 2022 which laid out "all persons interested, directly, indirectly, or contingently" in the Property. *Id*.

This Court issued a Citation to the interested parties on April 26, 2022. *See* Citation. On May 20, 2022, Premier Capital timely answered the Petition, objecting to the foreclosure due to the tax sale occurring during the bankruptcy stay. (Resp't's Answer.) Thereafter, Jutonus submitted a response to Premier Capital's objection on September 2, 2022. (Pet'r's Response.) Premier Capital replied to the response on September 6, 2022. (Resp't's Reply.) Finally, on October 14, 2022, Jutonus submitted a surreply in response. (Pet'r's Surreply.) A hearing was held on October 21, 2022. *See* Docket.

II

Standard of Review

The Rhode Island Rules of Civil Procedure do not apply to "petitions for foreclosure of redemption of interests in land sold for nonpayment of taxes." *Murray v. Schillace,* 658 A.2d 512, 514 (R.I. 1995); *Gaudreau v. Blasbalg,* 618 A.2d 1272, 1274 (R.I. 1993). Instead, the procedures

[1] Specifically, the District Assessor determined there was outstanding taxes due for the following years: 2014 in the amount of $1,929.03; 2015 in the amount of $1,961.67; and 2016 in the amount of $2,018.67. (Pet'r's Ex. A.)

codified in the Rhode Island Tax Sale Statute apply and practice relating to tax sales follows the course of equity. Section 44-9-33; *Albertson v. Leca,* 447 A.2d 383, 389 (R.I. 1982). When confronted with issues arising from foreclosure proceedings, the Court is cognizant that, "because of a property owner's disproportionate loss, '[l]egislatures and courts have acted to ameliorate the severity of tax forfeitures.'" *Medeiros v. Bankers Trust Co.,* 38 A.3d 1112, 1117 (R.I. 2012) (quoting *ABAR Associates v. Luna,* 870 A.2d 990, 994 (R.I. 2005).).

III

Analysis

A

Standing

Jutonus initially contends that Premier Capital, as creditor, lacks standing to enforce the automatic stay because the only legal beneficiaries are the debtor and the trustee. (Pet'r's Surreply 3.) In response, Premier Capital argues that it does have standing to enforce the automatic stay because the violation directly affects its interest in the Property. (Resp't's Reply 1.) Premier Capital further maintains that standing is irrelevant "because a tax foreclosure proceeding resulting in a transfer of the property that violates the automatic stay is void *ab inito*." *Id.*

Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1695 (11th ed. 2019). Therefore, "[a] standing inquiry focuses on the party who is advancing the claim," not the party defending against that claim. *Bucci v. Lehman Brothers Bank, FSB,* 68 A.3d 1069, 1079 n.7 (R.I. 2013) citing *Bowen v. Mollis,* 945 A.2d 314, 317 (R.I. 2008)).

Moreover, the plaintiff must have suffered an injury in fact—"an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not

'conjectural' or 'hypothetical.'" *Pontbriand v. Sundlun,* 699 A.2d 856, 862 (R.I. 1997) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). In addition, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* Lastly, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561.

In the context of petitions for foreclosure on the right of redemption, federal courts are divided on the question of whether creditors have standing to assert violations of stays. The Second and Fifth Circuit Court of Appeals have held that creditors have standing to enforce bankruptcy stays. *See generally 48th Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th Street Steakhouse, Inc.),* 835 F.2d 427, 431 (2d Cir. 1987); *St. Paul Fire & Marine Insurance Co. v. Labuzan,* 579 F.3d 533 (5th Cir. 2009) (Creditors had standing to pursue damages claim for alleged willful violations of automatic stay.). Although most often viewed to benefit debtors, automatic stays also provide a benefit to creditors. *In re Killmer,* 501 B.R. 208, 212 (Bankr. S.D.N.Y. 2013). Specifically, the courts that recognize creditor standing reason that the stay '"also protects creditors as a class from the possibility that one creditor will obtain payment on its claims to the detriment of all others."' *Id.* (quoting *Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association,* 997 F.2d 581, 585 (9th Cir. 1993)).

On the other hand, taking a textual approach in interpreting § 362 of the Bankruptcy Code, the Ninth Circuit has held that the only legal beneficiaries of the automatic stay are the debtor and the trustees. *Tilley v. Vucurevich (In re Pecan Groves of Arizona),* 951 F.2d 242, 245 (9th Cir. 1991). The court reasoned that "if the trustee does not seek to enforce the protections of the

automatic stay, no other party may challenge acts purportedly in violation of the automatic stay." *Id.* (citing *In re Brooks*, 79 B.R. 479, 481 (Bankr. 9th Cir. 1987)).

In this case, Premier Capital timely objected to the Petition to foreclose the right of redemption. In order to preserve its ability to challenge the validity of the tax sale, Premier Capital is required to do so in its answer to the petition to foreclose the right of redemption pursuant to § 44–9–31. Section § 44–9–31 provides in relevant part:

> "If a person claiming an interest desires to raise any question concerning the validity of a tax title, the person shall do so by answer filed in the proceeding on or before the return day, or within that further time as may on motion be allowed by the court, providing the motion is made prior to the fixed return date, or else be forever barred from contesting or raising the question in any other proceeding. . . ."

Premier Capital clearly is an interested party as demonstrated by the Title Examiners Report. *See* § 44-9-27[2].

Additionally, Premier Capital's injury is "fairly traceable" to the violation of the automatic stay because the consequence to Premier Capital is the imminent risk of divestment of its interest in the Property. Lastly, Premier Capital's injury would likely be redressed by a favorable judicial decision as the judgment lien would remain attached to the Property.

Furthermore, creditor standing is consistent with the goals of the Bankruptcy Code. One of the many goals of the Bankruptcy Code is to prevent a "chaotic and uncontrolled scramble for

[2] Section 44-9-27(a) provides in relevant part: "[u]pon the filing of a petition, the petitioner shall, at his or her own cost, select, with the approval of the court, a title company or an attorney familiar with the examination of land titles. This company or attorney shall make an examination of the title sufficient only to determine the persons who may be interested in the title, and the petitioner shall, upon the filing of the examiner's report, notify all persons appearing to be interested, whether as equity owners, mortgagees, lienors, attaching creditors, or otherwise, as well as the tax collector in the municipality where the subject property is located, of the pendency of the petition, the notice to be sent to each by registered or certified mail and return of receipt required. . . ."

the debtor's assets in a variety of uncoordinated proceedings in different courts." *Hunt v. Bankers Trust Co.,* 799 F.2d 1060, 1069 (5th Cir.1986). "The purpose of the automatic stay is to protect creditors in a manner consistent with the bankruptcy goal of equal treatment." *Homer National Bank v. Namie,* 96 B.R. 652, 655 (W.D. La. 1989). The pertinent part of the legislative history of § 362 states:

> "The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that." *St. Paul Fire & Marine Insurance Co.,* 579 F.3d at 540 (citing H.R. Rep. No. 595, 95th Congress, 1st Session (1977), S. Rep. No. 989, 95th Congress, 2d Session 49 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6010 (capitalization altered).

Accordingly, recognizing creditor standing is consistent with the purpose of the automatic stay and the goals of the Bankruptcy Code.

As such, this Court finds that Premier Capital has standing to proceed on this action and argue that the city's tax sale of the debtor's property was a violation of the automatic stay provision of the Bankruptcy Code.

B

Validity of the Underlying Tax Sale

1

The Bankruptcy Stay

The automatic stay provision of the Bankruptcy Code protects the interests of creditors by providing a fair and equal protection of interests. *See In re Pierce,* 272 B.R. 198, 204 (Bankr. S.D. Tex. 2001). *In rem* proceedings, or actions against property, are controlled by Bankruptcy Code

§ 362(c)(1). Section 362(c)(1) provides that "the stay of an act against property of the estate . . . continues until such property is no longer property of the estate." In the instant case, the underlying bankruptcy proceeding was opened on September 29, 2016. (Pet'r's Ex. B.) The stay remained in place until March of 2022 when the Bankruptcy proceeding concluded. *Id*. The sale occurred in 2017 while the automatic stay was in place.

2

The Violation of the Automatic Stay

Having determined the sale occurred during the pendency of the automatic stay, the question next turns to whether the tax sale is void *ab initio* or merely voidable. Courts are divided on this issue.

It is helpful to begin our analysis with defining the fundamental terms at hand—void and voidable. Void is often defined a "nugatory and of no effect and cannot be cured" whereas voidable "may be either voided or cured." *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989); *see also Cruz v. Mortgage Electronic Registration Systems, Inc.*, 108 A.3d 992, 997 (R.I. 2015) (in the context of contracts, "a void contract is a nullity, but that a voidable contract affects only one party and 'may be either ratified or rescinded at that party's election.'" citing *Moura v. Mortgage Electronic Registration Systems, Inc.*, 90 A.3d 852, 857 (R.I. 2014).). Voidable conduct is also conduct that which is "not void in itself" and is "capable of being adjudged void, invalid, and of no force." *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 909 (6th Cir. 1993) (citing Black's Law Dictionary 1574 (6th ed. 1990); Webster's Third New International Dictionary 2562 (1971).). In other words, the term "voidable" can also be viewed as invalidating an otherwise valid act or validating an otherwise invalid act. *See generally Moura*, 90 A.3d at 857.

The issue of ratification and rescission is the crux of the difference. When incapable of ratification or rescission, the conduct is void. Conversely, when the action can be ratified or rescinded, then the conduct is merely voidable at the election of one of the parties.

i

Void

The majority of Federal Courts of Appeals find that violations of the automatic stay are void *ab initio*. *In re Vierkant*, 240 B.R. 317, 322-23 (8th Cir. Bankr. App. Panel 1999) (citing *See Soares v. Brockton Credit Union (In re Soares),* 107 F.3d 969 (1st Cir. 1997)); *see also Constitution Bank v. Tubbs,* 68 F.3d 685 (3d Cir. 1995); *Parker v. Bain,* 68 F.3d 1131 (9th Cir. 1995); *Franklin Savings Association v. Office of Thrift Supervision,* 31 F.3d 1020 (10th Cir. 1994); *Rexnord Holdings, Inc. v. Bidermann,* 21 F.3d 522 (2d Cir. 1994); *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.),* 749 F.2d 670 (11th Cir. 1984); *Matthews v. Rosene,* 739 F.2d 249 (7th Cir. 1984); *In re Masterson*, 189 B.R. 250 (Bankr. D.R.I. 1995); *In re Manzueta*, 620 B.R. 195, 198 (Bankr. D. Mass. 2020) (foreclosure sale was void as violative of automatic stay where debtor electronically transmitted the petition for foreclosure minutes prior to completion of the sale).

Proponents of this argument reason that if the violative acts were voidable it would "have the effect of encouraging . . . the possibility that violators of the automatic stay may profit from their disregard of the law, provided it goes undiscovered for a sufficient period of time." *In re Garcia*, 109 B.R. 335, 340 (N.D. Ill. 1989). In fact, the Bankruptcy Court of the Southern District of New York went further by holding that even where a creditor with a lien interest in real property lacks standing to seek redress for a tax sale conducted in violation of an automatic stay, such sale

is void regardless of whether or not creditor was allowed to seek determination to that effect. *In re Killmer*, 501 B.R. at 212.

ii

Voidable

Conversely, the Federal Courts that have held actions in violation of the automatic stay are voidable argue congressional intent because section 362(d) provides bankruptcy courts the ability to make exceptions to the general stay. *Sikes*, 881 F.2d at 178. For example, 11 U.S.C. § 362(d) states "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . ." The Fifth Circuit has held actions occurring in violation of the stay are voidable because the sale remains invalid unless a party takes action to get the stay annulled in the bankruptcy court. *See In re Jones*, 63 F.3d 411 (5th Cir. 1995).

Although this question has not been squarely addressed, our Supreme Court has held that when tax sales are made in violation of the automatic stay and a party challenges the sale within its answer, the sale is deemed invalid. *Norwest Mortgage, Inc. v. Masse*, 799 A.2d 259, 263 (R.I. 2002). In *Norwest*, the Rhode Island Supreme Court held the underlying tax sale was "absolute" because the challenging party failed to challenge the sale within the times set out in § 44-9-31. *Id.* Thus, although a tax sale may occur in violation of an automatic stay, a tax sale will remain valid until and unless an interested party timely challenges the tax sale. *Id.*

Once a trial justice enters a decree of foreclosure, the underlying sale becomes "absolute."[3] *Id. See also Picerne v. Sylvestre*, 113 R.I. 598, 600, 324 A.2d 617, 618, 619 (1974). If violations

[3] Once a decree is entered, it may only be vacated by separate action within six months following the entry. Section 44-9-24. "Furthermore, the action to vacate shall only be instituted for inadequacy of notice of the petition amounting to a denial of due process or for the invalidity of

of an automatic stay were void *ab initio*, then the underlying tax sale would never be held "absolute" as seen in *Norwest* and *Picerne*. Additionally, if the sale was void *ab initio*, no party would be required to challenge the sale because the tax sale would be void regardless of when, if at all, the tax sale is directly challenged. *See In re Killmer*, at 211. Rather, the Court held that once the time to answer has passed, the dissatisfied party waives its right to void the sale and the tax sale continues to stand as valid. *Norwest Mortgage, Inc.*, 799 A.2d at 262.

Lastly, even if this Court were to deem the underlying tax sale void from the onset, the sale may nonetheless be validated if Jutonus seeks annulment or relief from the automatic stay with the bankruptcy court. *See, e.g., Jones*, 63 F.3d at 412 n.3. Therefore, the tax sale is voidable because a party can validate (by failing to timely challenge or by seeking retroactive relief with the bankruptcy court) or invalidate (by timely challenging) the tax sale. Accordingly, such violations of an automatic stay are merely voidable.

However, it is important to note that even when a sale is challenged—whether during or after redemption foreclosure proceedings—it may not be held to be invalid "by reason of any error or irregularity which is neither substantial nor misleading." Section 44–9–35; *Johnson v. QBAR Associates*, 78 A.3d 48, 52 (R.I. 2013).

Jutonus argues that Paul Fiano failed to list Jutonus or the Town of Westerly as a creditor in the bankruptcy action and, therefore, any violation of the automatic stay is merely technical. (Pet'r's Surreply 2.) Although true that the lack of actual or constructive notice may be a mere technical violation, "[t]here is no requirement that the party stayed be notified of or even aware

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the tax sale because the taxes for which the property was sold had been paid or were not due …" *Id.* Premier Capital does not assert lack of notice or contest the validity of the tax sale for improper taxation. Thus, once the Superior Court enters a decree foreclosing the right of redemption, Premier Capital is precluded from vacating the decree.

of' the bankruptcy in order for the stay to take effect." *In re Robert G. Blanchard,* BK No. 11-37755 (Bankr. D.R.I. May 4, 2012) at 7 (citing *In re Thane Development Associates L.P.*, 143 B.R. 310, 311 (Bankr. D. Mass. 1992). Accordingly, Premier Capital's failure to notify Jutonus of the pending bankruptcy does not safeguard Jutunos from ramifications arising from violations of the automatic stay.

Jutonus relies heavily on a District of Rhode Island Bankruptcy case, *In re Robert G. Blanchard,* in support of its position that the underlying sale was merely technical because the creditor was not on notice of the bankruptcy stay and, therefore, the sale should remain valid. (Pet'r's Surreply 3.) There, the court held the respondent "slept through any rights he may have had to the Cubby lot" when he failed to assert his interest in the lot until more than three years after filing its answer. *Id.* at 8. Moreover, the court went on to discuss how Blanchard himself was unaware of his own interest in the lot until one year before asserting said interest. *Id*. The court ultimately granted retroactive relief from the bankruptcy stay and declined to vacate the decree foreclosing the right of redemption. *Id*.

This case is clearly distinguishable. Premier Capital timely challenged the validity of the tax sale. *See* Answer. Premier Capital did not "sleep through any rights." The error here is far more fundamental because it never should have occurred in the first place. *See generally Mortgage Electronic Registration Systems, Inc. v. DePina,* 63 A.3d 871 (R.I. 2013).

Furthermore, the debtor in *Blanchard* moved to enforce an automatic stay and vacate the Superior Court decree foreclosing the tax title years after the decree was entered. *In re Blanchard* at 1. Here, the Court has not yet entered a decree foreclosing the right of redemption on the Property. In addition, Premier Capital has not waived its right to challenge the sale as did the debtor in *In re Blanchard* by failing to assert the challenge in its answer. *Id.*

Importantly, by relying on *In re Blanchard*, Jutunos fails to recognize the powers vested upon the Superior Court differ from those of the Bankruptcy Court. Jutunos argues that because the bankruptcy court has "discretionary power in certain circumstances to terminate, annul, modify or place conditions upon the automatic stay," this Court should not void the underlying tax sale because the violation "may be ripe for retroactive relief from the Bankruptcy stay." (Pet'r's Surreply 3.) This Court is not persuaded by Jutonus's argument because it is not the role of this Court to amend or annul the bankruptcy stay. The bankruptcy court has sole jurisdiction to annul, terminate, modify or place conditions upon an automatic stay. 11 U.S.C.A. § 362(d); *See Constitution Bank v. Tubbs*, 68 F.3d at 691 ("Relief from the stay can be granted only by the bankruptcy court having jurisdiction over a debtor's case."); *Maritime Electric. Company, Inc. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) *reh'g denied* (Mar. 25, 1992) ("Only the bankruptcy court with jurisdiction over a debtor's case has the authority to grant relief from the stay of judicial proceedings against the debtor."). Therefore, although the bankruptcy court may grant retroactive relief from technical violations of the automatic stay, this Court lacks such authority.

Here, an automatic stay was in place at the time of the tax sale. (*See* Pet'r's Ex. B.) The plain language of the Bankruptcy Code clearly prohibited the 2017 tax sale of the Property as well as the transfer of title in the Property. *See* Section 362 of the Bankruptcy Code.[4] Thus, this Court denies the request to enter a decree foreclosing the right of redemption because the underlying tax sale occurred in violation of the bankruptcy stay, Premier Capital timely preserved its right to challenge the sale, and the 2017 tax sale is invalid.

[4] Jutonus is free to seek retroactive relief from the automatic stay through the correct avenue—i.e., the Bankruptcy Court.

IV

Conclusion

For the reasons stated herein, this Court DENIES Jutunos's petition to foreclose the right of redemption on the Property. Counsel shall submit an order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Jutonus, LLC v. Paul P. Fiano, et al.**
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COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**November 18, 2022**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Petitioner:	**Douglas H. Smith, Esq.**
For Respondents:	**Lynda L. Laing, Esq.; Fernando S. Cunha, Esq.; Adam J. Rose, Esq.**